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In The

Supreme Court of the United States

October Term, 1995

DOUGLAS G. BAUGHER and ORIUS ASSOCIATES, INC.,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of California, Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether low level government employees whose duty it is to provide factual information to their superiors have a derivative privilege (arising out of the executive immunity privilege) whereby the low level employees have absolute immunity for malicious defamatory statements made or repeated by them to the press.

2. Whether an independent research scientist becomes a limited purpose public figure by undertaking a product safety study which is or later becomes a public controversy.

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PETITION FOR A WRIT OF CERTIORARI

Douglas G. Baugher and Orius Associates respectfully petition for a writ of certiorari to review the reversal of a $5 million judgment entered in the Superior Court of the State of California, County of Sacramento, by the California Third District Court of Appeal.

OPINIONS BELOW

The opinion of the Third District Court of Appeal of the State of California filed on March 19, 1996 is unreported. (App. a, *infra* 1a-35a) The April 18, 1996, Third District Court of Appeal of the State of California's Denial of Petition for Rehearing (App. c, *infra* 50a-56a) is unreported. On July 17, 1996, the California Supreme Court denied Appellants' petition for review, which denial is unreported. (App. d, *infra* 57a)

JURISDICTION

The California Supreme Court denied the petition for review on July 17, 1996, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court to hear this writ of certiorari is conferred on this Court by 28 U.S.C. § 1257.

THE CONSTITUTIONAL PROVISIONS THE CASE INVOLVES

1. U.S. Const. Amend. I, which provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

2. U.S. Const. Amend. XIV, § 1, cl.2:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Executive Immunity Privilege as established by common law.

STATEMENT OF THE CASE

This case presents for review two issues of critical importance to the effective functioning of the government and the feasibility of conducting scientific research: the scope of immunity from claims for civil damages of government officials involved in the oversight of scientific studies and the level of proof required by defamed scientists prior to recovering damages for false statements made by government officials.

Dr. Baugher's Study

Dr. Baugher designed and conducted a study which incontestably proved that a widely used pesticide, Zolone, was potentially harmful and dangerous in situations of prolonged exposure. The study harmed no one and, most importantly, prevented the continued Zolone use in California and the rest of the United States. The study displeased low level employees of the California Department of Agriculture (CDFA). The employees maliciously defamed Dr. Baugher by making statements that Dr. Baugher excessively exposed study volunteers to Zolone and that Dr. Baugher acted unethically and criminally in the manner in which he conducted the study.

Reversal of $5 Million Verdict by Third Appellate District

The subject appeal arises out of a jury verdict awarding Dr. Baugher $5 million for damages because of the loss of his scientific research business as a result of the defamation. The California Third District Court of Appeal reversed the judgment on the grounds that the defamatory statements, although made by a low level state employee (Veda Federighi) were privileged under the executive privilege.

The California Third District held that low level employees enjoy a "derivative privilege" which allows them to repeat defamatory statements that originate from other low ranking employees so long as the statements were previously made in the course of state sanctioned proceedings or investigations. (App. a, *infra* 28a-34a)

The California Third District Court of Appeal supported its finding of a "derivative privilege" on the grounds that governmental operations would be inhibited if low level employees do not enjoy the same executive privilege as their superiors. Specifically, the Court of Appeal stated:

> As a practical matter, the statements of high ranking executive officials can invariably be traced to factual information provided by their subordinates. In the light of statutes which require indemnity of public employees for acts occurring in the scope of employment (e.g., Gov. Code, § 825), the absolute privilege has virtually no impact if the officials' statements can be traced to their lower ranking employees. The sting of damages for defamation and the deterrent effect on the freedom of action of high-ranking officials will be the same regardless whether liability results directly from the privileged statement or derivatively through the antecedent statements of lower ranking employees upon which it is founded.

(App. a, *infra* 28a-29a)

Additionally, the California Third District Court of Appeal affirmed the trial court's determination that the plaintiffs were limited purpose public figures. The Appellate Court's conclusion that Dr. Baugher was a limited purpose public figure was primarily based upon an interpretation of the level of "voluntariness" set forth in a publication entitled "Law of Defamation" by R.A. Smolla of the College of William and Mary Marshall-Wyeth School of Law (1994). (App. a, *infra* 23a-26a) The Appellate Court quoted a section from "Smolla" indicating that

a person may become a limited purpose public figure by voluntary involvement in an "activity out of which publicity would foreseeably arise". (App. a, *infra* 25a)

The Appellate Court thereafter concluded that Dr. Baugher was a limited purpose public figure in that he "was adequately placed on notice that his actions . . . would be subject to the risk of intense media scrutiny and commentary by partisans and observers of the controversy"; because as "an affluent professional with some experience in the uses of the media, he had resources allowing him some access to channels of communication for counterspeech" and although "he was not prominent in the preexisting controversy concerning Zolone," "he did engage in significant efforts to attempt to influence the controversy" in that he "hoped [his study] would resolve the controversy in favor of the use of Zolone on grapes." (App. a, *infra* 24a)

Thereafter, in its Opinion on Denial of Petition for Rehearing, the Court of Appeal distinguished Dr. Baugher from the scientist in the case of *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), on the grounds that there "was no pre-existing controversy in *Hutchinson v. Proxmire*." (App. c, *infra* 55a-56a)

PROCEEDINGS BELOW

On August 29, 1990, the plaintiffs filed a Complaint for libel, slander, and intentional infliction of emotional distress against the State of California, California Department of Food and Agriculture ("CDFA") and the State Board of Control.

On April 30, 1992, this case came on for the first time for a jury trial. The trial judge granted Defendant's motions for judgment on the pleadings and for summary judgment on the grounds that the action was barred by the absolute privilege because the defamatory statements were made in the course of a judicial or administrative proceeding within the scope of a public employee's employment. Additionally, the trial court determined that the defamatory statements were absolutely privileged in that they were made in the proper discharge of an official duty. The plaintiffs appealed the judgment following the orders.

On May 26, 1993, the California Third District Court of Appeal reversed the judgment and remanded the case back to the trial court with directions to enter orders denying the motions for judgment on the pleadings and summary judgment. (App. b, *infra* 36a-49a) The California Third District Court of Appeal held that the defamatory statements were not made during the course of any official proceedings so as to qualify for an absolute privilege. (App. b, *infra* 37a, 45a-49a) Additionally, the Court of Appeal held that the oral statements by the Information Director (Veda Federighi) identifying Dr. Baugher as "the" scientist under investigation to the press were not privileged under the executive privilege. (App. b, *infra* 42a)

On March 21, 1994, this case came on a second time for jury trial, before the Honorable Cecily Bond. Before a jury was called, and after the presentation of evidence on the issue and argument by counsel for the parties, the trial court made a finding that the plaintiffs were limited purpose public figures. The jury was therefore instructed

that they must find constitutional malice prior to awarding any damages to the plaintiffs.

The case thereafter went to the jury and resulted in a judgment of $5 million for the plaintiffs. Motions for a New Trial and for Judgment Notwithstanding the Verdict were made by the Defendant. The trial court denied both motions and affirmed the judgment, but issued a remittitur in the amount of $500,000.00. The net judgment was then $4.5 million.

Defendant State of California appealed the judgment on June 17, 1994. The Plaintiffs cross-appealed on the issue of whether the Plaintiffs were limited purpose public figures for the purpose of this action.

On March 19, 1996, the California Third District Court of Appeal reversed the judgment with directions that the trial court enter judgment for the Defendant/Appellant. (App. a, *infra* 35a)

On April 3, 1996, the Plaintiffs/Cross-Appellants filed a Petition for Rehearing.

The California Third District Court of Appeal denied the Petition for Rehearing by an Opinion filed on April 18, 1996. (App. c, *infra* 50)

STATEMENT OF THE FACTS

The following brief narrative statement of the facts is meant to provide context. Simply change the names of the players and the products, and the fact situation applies to virtually anyone who conducts product safety testing in the United States.

A. HISTORY OF ZOLONE

In the late summer of 1987, some grape harvesters in the Central Valley of California were believed to be poisoned; some were hospitalized. By inference from circumstances, Dr. Michael O'Malley of the CDFA named the organophosphate insecticide, Zolone, as the causative agent. The manufacturer, Rhone-Poulenc Agrochemicals Company, as well as some CDFA scientists and independent scientists, were not certain or did not believe Zolone to be responsible. For almost twenty years, without incident, Zolone was an insecticide legally used in the State of California, and in other agricultural production areas throughout the world. There was internal controversy over Zolone, but as yet no press involvement or public interest. A definitive answer could be obtained only through a well controlled, independently conducted, scientific study the next harvest season.

With the benefit of hindsight, it was determined that Zolone use increased significantly in 1987 in response to an outbreak of leafhoppers. This increased use meant that consistent, day-to-day exposure to pesticide residues was much more likely in 1987 than it had been in the first twenty years of Zolone's use in California.

B. PLAINTIFFS RETAINED TO CONDUCT RESEARCH

In the Spring of 1988, Rhone-Poulenc contracted with Dr. Douglas Baugher and Orius Associates, Dr. Baugher's Maryland based research company specializing in risk assessment and the monitoring of worker exposure to

pesticides, to develop a protocol and conduct an independent study of the effects of the insecticide on blood enzymes of volunteers harvesting Zolone-treated grapes. By monitoring two blood enzymes daily during six consecutive days of harvesting, the potential for Zolone to poison harvesters could be determined without actually putting any of the volunteers at risk of illness. Dr. Baugher was retained as Study Director, precisely because he would not attempt to influence the study outcome in any way to help Rhone-Poulenc since Dr. Baugher was an independent researcher with impeccable credentials and reputation. Had Dr. Baugher been known to influence studies, he would have had no credibility and no business.

When Dr. Baugher was contacted and retained to do the study in April, 1988, there was no public controversy or public interest in the study.

C. THE STUDY

A study protocol was developed and authorized by Dr. Baugher and the Sponsor's Representative, Dr. Ronald Baron of Rhone-Poulenc. Both Dr. Baugher and Dr. Baron are recognized experts in the toxicity of insecticides to humans.

The CDFA neither approved nor disapproved the study protocol, and put no restrictions on Dr. Baugher's or the Sponsor's right to amend the study protocol as they saw fit. The study was conducted under the most exacting scrutiny standards in the world, the federal Good Laboratory Practices Standards Regulations (at CFR Part 160) designed specifically to prevent scientific fraud

and incompetence. The study protocol was amended three times: the third amendment was later used by CDFA to create a controversy.

The monitoring study began in mid-August of 1988 with only six days of harvesting exposure for study participants. Blood testing was successfully concluded in late August 1988. No volunteer harvesters became ill or were ever at risk of illness due to their short term exposure to Zolone.

D. MEDIA INTEREST

In August, 1988, a college student in Porterville, California notified the press of the upcoming worker monitoring study. Dr Baugher directed all initial press inquires to Mr. John Corkins of Research for Hire, his prime subcontractor, and to the Rhone-Poulenc representative on site. In his first professional employment at American Cyanamid Company years before, Dr. Baugher was instructed to never speak to the press and to always turn requests over to a properly designated public relations officer. He has scrupulously followed that advice throughout his career.

Rhone-Poulenc sent a "Public Relations Specialist," Mary Anne Ford, from its headquarters in North Carolina, out to the vineyards where the study was taking place to coordinate a "press day", which was set to occur on the second day of harvesting. Consequently, Mary Anne Ford and CDFA's Pest Management/Worker Health and Safety unit chief, Dr. Robert Krieger, explained to media representatives what the study was all about. Ms. Ford read a prepared statement and introduced Dr.

Krieger, Dr. Baron, Dr. Baugher and Mr. Corkins. Dr. Baron and Dr. Krieger gave a short presentation to the press and then the press was permitted to interview anyone they wanted, including the pickers.

One or two of the press people asked questions of Dr. Baugher, but they were much more interested in Dr. Krieger (who represented the CDFA regulators), Dr. Baron (who represented the big money multinational corporation manufacturer) and the volunteer harvesters (human interest). Dr. Baugher did not have any other contact with the press either before or after this press day.

E. ZOLONE TAKEN OFF MARKET

Based on the blood enzyme test results developed during the study, it was concluded that had exposure continued beyond the scheduled six days of harvesting, several of the workers would probably have developed classic signs and symptoms of organophosphate poisoning – reversible but unpleasant physical illness symptoms. The study conclusively established that Zolone had the proven potential to poison grape harvesters and other people who hand-harvested treated fruits and vegetables over extended periods of time.

Shortly after Rhone-Poulenc submitted its final report to CDFA in early February, 1989, it voluntarily canceled Zolone registrations in California and on the federal level and permanently withdrew Zolone from the United States market. When the final report was submitted, the press had no interest in the study.

F. CDFA PRESS RELEASE

In February, 1989, there was a "sign-off" policy and a procedure in effect within CDFA involving press releases. The procedure was that a press release would move up the "chain of command" through the department with certain sign-off requirements at various levels and then it would eventually go to the directorate's office for a final approval signature prior to release to the media. The CDFA Director or the Deputy Director would be the final level to sign off on the press release. At the time of the February 22, 1989, press release, CDFA did not know which individuals were responsible for the perceived wrongs and it was departmental "protocol" to **not** "name names" in press releases.

On February 22, 1989, the CDFA issued a press release indicating that the CDFA was going to be conducting an investigation into the 1988 Zolone grape study. The press release stated that the "researchers" who conducted a pesticide research project in August, 1988, had among other things, "violated approved procedures," "violated the ethics of their profession," committed an "unbelievable breach of trust" with the CDFA by changing the research study protocol and failing to remove participants whose cholinesterase levels fell 25% below their baseline.[1] Rhone-Poulenc also issued its own press release on the East Coast on February 22, 1989.[2]

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[1] A clinically insignificant plasma cholinesterase depression.

[2] It is a most significant point that while the two press releases contained statements condemning the actions of Zolone grape study "researchers", the press releases could not

When CDFA was preparing its press release, it was also coordinating press releases with Rhone-Poulenc, which received a "heads up" fax of CDFA's final draft of the press release. Dr. Baugher received no such notification and was not consulted for input.

There was specific discussion about putting names in the first, February 22, 1989, press release. However, it was finally decided not to "name names" in the press release. The press release that was approved through the CDFA "channels of authority" did not "name names".

G. CDFA LOW LEVEL EMPLOYEES' RELEASE OF PLAINTIFFS' NAMES

On or about February 22, 1989, Veda Federighi identified the plaintiffs to reporter Gary Sack as "the researchers" referred to in the CDFA press release. Gary Sack then informed reporter Shawn Turner of the names who then used the information in a radio broadcast over a network of 24 radio stations.

Thereafter, the plaintiffs were identified by Veda Federighi as the "researchers" referred to in the CDFA press release in numerous publications, including "Ag Alert," which is a publication of the California Farm Bureau Federation. Advertisers in the publication include all major agricultural chemical companies.

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constitute actionable defamation in that there were no "ascertainable persons" named in the press releases to be harmed by the disparaging remarks! *Harris v. Curtis Pub. Co.*, 8 Cal.App.3d 839, 87 Cal.Rptr. 614 (1970); Restatement of the Law (Second) Torts § 564.

Veda Federighi learned that Dr. Baugher was under investigation through her frequent conversations with Dr. Robert Krieger and James Wells, who helped her to develop the press release. Dr. Krieger was not the CDFA Director nor a Deputy Director and could not authorize a news release himself. Likewise, James Wells, a non-executive assistant to Mr. Rex Magee, and Veda Federighi, a non-executive public relations specialist, did not have authority to approve a news release themselves.

There was an abundance of circumstantial evidence that both Dr. Krieger and James Wells had the motivation and intention to ruin Dr. Baugher and his business.[3] The

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[3] The circumstantial evidence included the following: (1) Krieger was the head of the CDFA unit which had done its own study with the same pesticide, Zolone, at the same time as Dr. Baugher was conducting the subject study; but Dr. Krieger's study concluded that Zolone was safe for continued use in California while Dr. Baugher's study concluded that Zolone should be removed from the market place because exposures over extended periods of time could lead to illness in farm workers exposed to its residues; (2) Dr. Krieger knew when the February, 1989, press release was issued that there had been three (3) amendments to the Zolone grape study protocol and therefore it was not a true statement that the protocol still, after the third amendment, provided for study participants to be removed after a 25% depression of their plasma ChE.; (3) Dr. Krieger indicated to Rhone-Poulenc personnel that careers were in jeopardy over the 1988 Zolone grape study and that Dr. Baugher would never work in California again; (4) James Wells testified that he did not at any time personally review a copy of the Zolone study protocol yet, it was decided that James Wells was the "best" person to speak for CDFA's pesticide regulation unit and make a statement for inclusion in the press release. Wells, who readily acknowledged that he is not a scientist, made his own judgment that the plaintiffs had violated the ethics of

most blatant example occurred several days before the issuance of the February, 1989 press release: Krieger stated emphatically to Rhone-Poulenc that Dr. Baugher would never work in California again.

In the end, the CDFA concluded that Dr. Baugher had violated no rules, regulations or laws: Dr Baugher had done nothing wrong!

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL ISSUES GROUNDED ON THE IMMUNITY DOCTRINE, THE EFFECTIVE FUNCTIONING OF THE GOVERNMENT, THE FIRST AMENDMENT AND THE LAWS OF DEFAMATION BY QUESTIONING THE OUTER LIMITS OF THE EXECUTIVE PRIVILEGE

This case is similar to *Barr v. Matteo*, 360 U.S. 564 (1959), and its progeny, in that this case involves a conflict between the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of government officials on the

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their profession and wanted statements indicating that someone would be held accountable attributed to him; (5) Neither Krieger nor Wells told Veda Federighi about the "Adachi Report" (a CDFA sponsored investigation) which cleared Dr. Baugher's name, thus evidencing that Krieger and Wells intended that Veda Federighi remain convinced of Dr. Baugher's unethical and criminal conduct and not know that an internal CDFA investigation found that Baugher had done nothing wrong!

one hand; and the protection of the public interest by shielding responsible governmental officers against the hazards of damages suits brought on account of action taken in the exercise of their official responsibilities on the other hand.

However, this case departs from the test for determining the application of governmental immunity (as derived from *Barr* and its progeny[4]) enunciated by the

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[4] In *Barr* the acting director of an agency had been sued for malicious defamation by two employees whose suspension for misconduct he had announced in a press release. The defendant claimed an absolute or qualified privilege. The plurality opinion inquired whether the conduct complained of was among those "matters committed by laws to [the officials] control" and concluded, after an analysis of the specific circumstances, that the press release was within the "outer perimeter of [his] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." *Barr* at 575.

Subsequently, in *Butz v. Economou*, 438 U.S. 478 (1978), the Court determined that "Barr clearly held that a false and damaging publication, the issuance of which was otherwise within the official's authority, was not itself actionable and would not become so by being issued maliciously." *Butz* at 488. However, the Court noted in *Butz* that "from the care with which the Court inquired into the scope of his authority, it may be inferred that had the release been unauthorized, and surely if the issuance of the press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld." *Butz* at 489.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court noted that "for executive officials in general, [ ], our cases make plain that qualified immunity represents the norm". (*Id.* at 807.) Specifically, the Court held that the "function" approach that had characterized immunity decisions of the Court prohibited a finding of absolute immunity for presidential aides

court in *Westfall v. Erwin*, 484 U.S. 292 (1988). The *Westfall* Court held that immunity is determined by: (1) whether the conduct was within the outer perimeter of an official's duties; and (2) whether the conduct was an appropriate exercise of discretion which an officer of that rank must possess if the public service is to function effectively. *Id.* at 298.

Here, the California Third District Court of Appeal has ignored the functional test and has effectively extended the "outer perimeter" of an executive's conduct or speech to include a subordinate's conduct or speech so long as the subordinate's speech occurred while the subordinate was investigating "facts" to report to his or her superior. Additionally, the California Third District Court of Appeal has eliminated any inquiry into whether the conduct was "discretionary."[5] Therefore, the California

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in the performance of all of their duties. Rather, to establish entitlement to absolute immunity, an executive employee must first show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability and that the aide was discharging the protected function when performing the act for which liability is asserted.

[5] Although the Third District's Opinion reversing the judgment for the plaintiffs did not discuss whether Veda Federighi's release of the plaintiffs' names was discretionary, it is almost certain that *had* the Third District considered this issue, it would have been bound by its earlier determination (in its May 26, 1993 opinion) that " 'the timing of any particular release, the content of any particular release, and the manner in which a release is made constitute the implementation of the policy, more properly described as the operational aspect of the policy, and are not entitled to . . . protection . . . ' (*Toney v. State of California*, 54 Cal.App.3d 779, 792-293 (1976))." (May 26, 1993, Opinion, App. b, *infra* 43a) (*See also Berkovitz v. United States*, 486

Court of Appeal's determination that there is a derivative privilege for statements made by low level employees creates a broadening of immunities for government employees. The privilege, if recognized, would allow low-level government employees to repeat statements made in "closed door" proceedings or non-public government investigations without the need for an approved press release from high level executives.

A. THIS COURT SHOULD DELINEATE WHAT, IF ANY, LIMITATIONS MAY BE PLACED UPON SPEECH AND CONDUCT OF LOW LEVEL GOVERNMENT EMPLOYEES TO PROTECT MEMBERS OF THE PUBLIC FROM ABUSES BY LOW LEVEL EMPLOYEES

This case presents the opportunity for the Court to definitively determine whether statements made to the press in violation of a governmental agency's policy may *ever* be subject to a privilege. In *Butz v. Economou*, 438 U.S. 478 (1978), this Court noted that *Barr* did not address the liability of the acting director had his conduct *not* been within the outer limits of his duties, but that it may be inferred from *Barr* that "**had the release been unauthorized**, and surely if the issuance of the press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld." (*Id.* at 89.)

U.S. 531, 536 (1988), wherein the Court held that a "discretionary act" requirement is not satisfied if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive."

Currently, citizens have some level of protection from malicious false statements made in the course of investigations or other official acts conducted by executive officials in that the general rule is that executives have a qualified immunity rather than an absolute immunity. (*Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Scheuer v. Rhodes*, 416 U.S. 232 (1974).) Additionally, citizens have a protection from statements made in the course of enforcement proceedings and judicial proceedings in that they may challenge the legality of the proceedings and they may present evidence to the trier of fact. Further, as the Court noted in *Forrester v. White*, 484 U.S. 219 (1988), "Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side effects inevitably associated with exposing judges to personal liability." (*Id.* at 227.) In fact, in *Cleavinger v. Saxner*, 474 U.S. 193 (1985), the Court held that in some instances of adjudicatory proceedings (including the Discipline Committee of a federal prison), there may not be sufficient procedural safeguards to justify absolute immunity for those who instituted the proceedings.

It is imperative that a clear statement of the level of immunity applicable to low level employee "fact-finders" and the rights of citizens to seek redress for abuses of governmental offices be set forth so that government employees and private citizens will know the parameters before making decisions on whether to become involved in or otherwise speak out regarding investigations or hearings conducted by state agencies.

B. THE CALIFORNIA THIRD DISTRICT COURT OF APPEAL ERRONEOUSLY DETERMINED THAT RESPONDENT WAS IMMUNE FROM LIABILITY FOR PUBLISHING DEFAMATORY FALSEHOODS ABOUT THE PETITIONER BECAUSE RESPONDENT'S LIABILITY FOR MALICIOUS STATEMENTS OF SUBORDINATES WOULD INTERFERE WITH THE ABSOLUTE PRIVILEGE OF HIGH RANKING OFFICIALS

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1952), the Court explained the reason that "qualified immunity [for executive officials] remains the norm." While the Court noted that high officials require greater protection than those with less complex discretionary responsibilities, the Court held that a qualified or good faith immunity defense is a proper balance of the competing values of the need to protect officials who are required to exercise their discretion and the related public interest in encouraging a vigorous exercise of official authority. (*Id.* at 807.) Further, the Court rejected a derivative immunity for Presidential subordinates on the grounds that the "undifferentiated extension of absolute 'derivative' immunity to the President's aides [ ] could not be reconciled with the 'functional' approach that has characterized the immunity decisions of this Court." (*Id.* at 810.)

A "derivative privilege," as recognized by the California Third District Court of Appeal would vastly expand the executive or cabinet level privilege to create a virtually impenetrable privilege which immunizes knowingly false statements made by low level employees (i.e. subordinates of cabinet level officials) so long as the

statement was made in connection with the employee's job. There is no logical justification for this extension. Certainly a cabinet level official would know that the policy of his or her department was "not to name names" and thus would not identify any person to the press even if the identity of that person had been provided to the cabinet level official by lower ranking employees!

This "derivative privilege" protection is far greater than the employee would have as a private citizen criticizing a public official. There is no particular reason to provide a low level governmental employee with this extended right to defame others merely because the employee works for a governmental entity!

In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court held that the repetition of defamatory comments in newsletters or press releases, which comments were originally made in a legislative hearing were not "essential to the deliberation of the Senate," were not part of the deliberative process and thus were not protected speech. (*Hutchinson*, 443 U.S. at 132-133.) While the *Hutchinson* court based its decision on the parameters of the Speech and Debate Clause, the reasoning is equally applicable to the subject fact situation wherein the defamatory comments of certain low level employees (e.g. Veda Federighi) were repeated outside of any "protected proceedings."[6]

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[6] As is set forth hereinabove, the Third District previously determined (on the defendants' motions for judgment on the pleadings and for summary judgment) that the defamatory statements were *not* made during the course of official proceedings. (App. b, *infra* 45a-49a)

If civil immunity protections to United States Senators and their staff from suits seeking damages for defamation when matters stated on the floor of the United States Congress are repeated outside of the chambers of the Senate are not protected, defamatory falsehoods made and repeated by low-level employees of the California Department of Food and Agriculture to the media cannot be protected.

In this case, and in all cases of "leaks" to the press, the only conceivable purpose behind the making of *knowingly false statements* is for the purpose of assuring that the listener (media related or otherwise) will repeat the defamatory statements and bring harm and/or retribution to the person against whom the low level governmental employee(s) making the statement hold great animosity. Here, the original statements made by low level employees, who had no authority to issue press releases, were made for the purpose of assuring that one of the least knowledgeable low level employee listeners, *whose job they knew involved daily contact with the media,* would repeat the statements.

II. THE DETERMINATION THAT DR. BAUGHER WAS A LIMITED PURPOSE PUBLIC FIGURE EXPANDS THE SCOPE DECISION OF THE SUPREME COURT OF THE UNITED STATES ON THE SAME CONSTITUTIONAL ISSUES

A. THE CALIFORNIA THIRD DISTRICT COURT OF APPEAL DETERMINED THAT AN INDEPENDENT RESEARCH SCIENTIST CAN "VOLUNTARILY" INJECT HIMSELF OR HERSELF INTO A CONTROVERSY BY CONDUCTING A STUDY WHICH PROVES A SUBSTANCE HARMFUL

This Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), applied the definition of a "public figure" announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to determine whether the plaintiff scientist who was defamed in a press release was required to prove malice. The Court held that the scientist (Hutchinson) did not become a public figure because Hutchinson did not thrust himself or his views into public controversy to influence others, Hutchinson "at no time assumed any role of public prominence", Hutchinson did not "invite" public attention by publishing in professional journals and Hutchinson did not have regular and continuing access to the media. (*Hutchinson*, 443 U.S. at 135.)

Similar to the plaintiff in *Hutchinson*, prior to the time the defamatory remarks were made by the Defendants, Plaintiff Douglas G. Baugher **did not on** *any occasion* voluntarily initiate contact with the press. Douglas Baugher had only **minimal** contact with the public and the press prior to the time of the defamatory remarks which consisted of **responding** to a few technical questions on "Media Day." Further, Dr. Baugher's study did

not become particularly controversial until the results of the study were announced indicating that Zolone, the subject of the study, could cause harm to workers exposed to residues over extended periods of time. Finally, the primary reason that Dr. Baugher's study attracted widespread media coverage was the defendants' statement that Dr. Baugher was under investigation for poisoning farmworkers.

The California Third District Court of Appeal avoided considering the above referenced factors in determining whether Dr. Baugher had become a public figure. Instead, the fundamental "fact" relied upon by the California Appellate Court to determine that Dr. Baugher had become a public figure was the conclusion that Dr. Baugher, by performing a study on the use of Zolone, was attempting to "resolve the controversy in favor of the use of Zolone on grapes" (App. a, *infra* 24a.) The California Appellate Court apparently did not consider the uncontroverted fact that Dr. Baugher was retained as an independent scientist to *monitor* the legal use of Zolone on grapes was relevant in determining whether Dr. Baugher was attempting to influence the "Zolone controversy."

Therefore, the California Third District Court of Appeal's determination that Dr. Baugher became a limited purpose public figure, in spite of the fact that there was no evidence of any *voluntary* act on his part to influence the resolution of a controversial issue, is a departure from the general rule in *Gertz* that requires that a person "invite attention and comment." (*Gertz*, 418 U.S. at 345.)

The California Court of Appeal's Third District has created a new test for status as a limited purpose public

figure wherein the following questions are considered: (1) Did the scientist undertake a study which is or later became a public controversy? (2) Did the scientist attempt to influence the outcome of a public controversy by doing a study? (3) Does the scientist, as a result of his success as a businessman, have media skills, access to channels of communication, and overall ability to mount an effective counterspeech campaign? The California Third District Court of Appeal has not stated whether all three conditions must be answered positively, or whether one or two are sufficient to label a person a limited purpose public figure.

The three-pronged approach used in this case has wide applicability and danger. This new interpretation means that almost any researcher can involuntarily be made a public figure subject to the constitutional malice standard of proof if partisans disparage him or his work. The cascade of events leading to defamation could become all too common: a scientist undertakes a study; media interest later develops without invitation by the researcher; and, the door is open for potential defamers to do their work under protection of the constitutional malice standard of proof.

Review of the new test used by the California Court of Appeal's Third District will delineate exactly how a product safety researcher can become a voluntary or involuntary public figure and the consequent protections he will be afforded in protecting his reputation. These determinations are vitally important in that the public safety depends upon product safety research. Those who do such work certainly ought to know their legal standing, i.e., whether every study will be a gamble of reputation, business and income; and how (or if) they must (or

can) structure their work or limit their speech or involvement in "public issues" to protect themselves.

It is generally recognized that to become a public figure, one must voluntarily inject himself into a public controversy in an attempt to influence its outcome. While it is true that *results* of an independent study may be used by the scientist or by others to influence the outcome of a public controversy, the study results are most often used by others, such as regulatory agencies or product manufacturers. Of course, foreknowledge of results of scientific studies is virtually impossible when a study is conducted by an independent scientist. Thus, where scientists who conduct studies, without foreknowledge of the results or without later promoting the results, are placed in the same category as those who "attempt to influence" a controversial issue, independent scientists would invariably acquire the status of involuntary public figures.

Should the California Third District Court of Appeal decision stand, no researcher of sound mind would risk undertaking a study, including any product safety testing, with any potential for controversy in California.

B. THE ONLY JURISDICTION TO RECOGNIZE AN "INVOLUNTARY" PUBLIC FIGURE IS THE D.C. CIRCUIT COURT

The only jurisdiction to recognize the existence of an involuntary public figure is the Washington, D.C. Circuit Court. In *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), the court held that a plaintiff may become an "involuntary public figure" by simply being a traffic controller on duty at the time of a plane crash and in *Clyburn v. News World Communications, Inc. and One-Up*

Enterprises, Inc., 903 F.2d 29 (D.C. Cir. 1990), the court held that "hobnobbing" with well-known people may place one at the "heart of controversy." Neither of the two cases have previously been used to create a special exception in the case of independent scientists who conduct research.

In *Dameron*, the court determined that it is possible, **although difficult and rare** [emphasis added], to become a limited-purpose public figure *involuntarily*. (*Dameron*, 779 F.2d at 742):

> In *Gertz* the Supreme Court noted that it is "possible to become a public figure through no purposeful action of [one's] own" although it added that "the instances of *truly* involuntary public figures must be exceedingly rare." *Id.* at 345, 94 S. Ct. at 3009 (emphasis added.) We think that within the very narrow framework represented by the facts of this case, such has been Dameron's fate.

Furthermore, the court in *Dameron* noted that the defamatory publication never mentioned the plaintiff (Dameron) by name "or other identifying characteristics" so that a magazine reader could only tie the defamation to Dameron by referring to other publications concerning the crash in which Dameron's participation in the events leading up to the crash had been noted. The court noted that "Indeed, it was partly *because* of the defendant's public notoriety that he was identifiable at all from the oblique reference in *The Washingtonian*." (*Dameron*, 779 F.2d at 742.)

Here, the Court may distinguish those cases where the identity of the defamed person is previously known

to the press from those cases where the identity is given to the press by the defamer. The defamatory statement in this case was the statement that *tied the plaintiff's name as the researcher under investigation*. Thus, until the defamatory statements were made identifying Douglas Baugher as "the bad guy," Douglas Baugher was a relatively unknown research scientist.

In *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990), the D.C. Circuit court found another "unique" fact pattern which it believed required a departure from the rule that a person must *voluntarily* inject himself into a public controversy to achieve "limited purpose public figure" status. Once again, the court noted that "the instances of truly involuntary public figures must be exceedingly rare," but determined that an individual (Clyburn) who falsely told the Washington Post that he had been alone with a drug overdose victim when in fact other famous people had also been present was a limited-purpose public figure. The court based this determination upon two facts: (1) Clyburn's acts *before* any controversy arose put him at its center in that his consulting firm had numerous contacts with the District government and social contacts with administration officials; and (2) Clyburn made false statements to the press at the outset of the controversy.

This Court should either distinguish the peculiar facts of *Clyburn* from instances of independent scientific research or make it clear that scientists who conduct research and reach unpopular results may become limited purpose public figures.

III. REVIEW SHOULD BE GRANTED SINCE IT IS IMPORTANT THAT SCIENTISTS AND GOVERNMENT EMPLOYEES KNOW THEIR RESPECTIVE RIGHTS AND LIABILITIES SO THAT FUTURE SCIENTIFIC PRODUCT SAFETY STUDIES WILL NOT BE INHIBITED

Even though the subject decision is not published, it is certain that word of the decision that low level government employees have been found to have derivative immunity will spread to state and other local government employees throughout California. Further, it is extremely likely that the government employees, upon hearing of the decision, will depend upon the determination that all government employees have complete immunity for statements made in the course of their employment. Consequently, government employees will feel no need to refrain from making defamatory statements concerning private citizens. The end result may likely be a host of defamation suits against state and local governments arising out of statements made or repeated by disgruntled or vengeful government employees.

CONCLUSION

For all the foregoing reasons, the petitioners' application for a writ of certiorari should be granted.

Respectfully submitted,

UREMOVIC & FELGER

JOSEPH A. UREMOVIC,
Attorneys for Petitioners Douglas G. Baugher and Orius Associates

Dated: October 7, 1996.

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DOUGLAS G. BAUGHER et al., Plaintiffs, Respondents, and Appellants, v. STATE OF CALIFORNIA et al., Defendants, Appellants and Respondents.	C018626 & C018843 (Super. Ct. No. CV515997) (Filed March 19, 1996)

This is an appeal and protective cross-appeal following a plaintiffs' judgment for $4,500,000 in damages in an action for defamation and intentional infliction of emotional distress.

The action was brought against the State of California and several state employees (collectively the State). It is predicated upon the claimed liability of the Department of Food and Agriculture (Department) and its employees for their conduct in supplying information for: (1) statements in a Department press release which asserted that researchers who conducted a study of humans exposed to a pesticide committed a breach of trust, acted unethically, and were under investigation to determine if they had

violated the law, coupled with (2) a statement by a Department spokesperson identifying plaintiffs as among those researchers.

The State appeals contending the judgment is infirm for lack of "constitutional malice" under *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686] and for lack of substantial evidence that the aspersions in issue are false.

In a protective cross-appeal plaintiffs Dr. Douglas Baugher and Orius Associates, Inc. (collectively Dr. Baugher) contend that "constituitonal malice" is immaterial because they are not "public figures" for whom the "malice" standard is applicable. We will conclude that Dr. Baugher is a "public figure" for purposes of his conduct as director of the human exposure study because he was on notice that his actions would subject him to intense public scrutiny.

The State claims the trial court erred in permitting the jury to consider the "constitutional malice" of the employees who supplied the information contained in a privileged press release. We agree. The privilege for statements made in the discharge of an official duty (Civ. Code, § 47, subd. (a)), applicable to high government officials, necessarily protects the State against derivative liability for the conduct of the subordinate employees who supplied the information to the high ranking officials and, accordingly, precludes a finding of "constitutional malice." That limits the issue to the malice of the Department spokesperson who released the names of the researchers to the press. On this record that is the only information with which the spokesperson can be charged

and because it is true cannot constitute "constitutional malice" to be imputed to the State.

We will reverse the judgment and direct that judgment be entered for the State.

FACTS AND PROCEDURAL BACKGROUND

Organophosphates are a class of chemicals used as insecticides. In the normal functioning of the nervous system a transmitter chemical, acetylcholine, signals a nerve stimulus and then is broken down through the action of an enzyme, cholinesterase. Organophosphates are cholinesterase inhibitors and function as insecticides by preventing the break down of acetylcholine, leading to continuous overstimulation of the nervous system with lethal results. The mammalian nervous system also uses acetylcholine and cholinesterase in this manner in the transmission of stimuli. (Indeed, organophosphates were originally developed as nerve gas agents in the Second World War.)

In humans cholinesterase is present in the blood stream as well as in the nervous system. One type is located in red blood cells and another type, plasma cholinesterase, in the rest of the blood serum. Physicians measure the decline or rapidity of decline of these types of cholinesterase in the blood as an indicator of exposure to organophosphates. Plasma cholinesterase differs chemically from the cholinesterase in the nervous system and red blood cells. It is a more sensitive indicator of exposure to organophosphates than red blood cell cholinesterase for some chemicals, such as the organophosphate of interest here, phosalone.

However, even a 100 percent depression in the level of plasma cholinesterase does not mean there will be other physical signs or symptoms which are the criteria of organophosphate poisoning. The rapidity of the decline in blood cholinesterase levels is a better indicator of impending symptoms than the degree of decline. Symptoms are variable since organophosphate poisoning resembles a dozen or more common illnesses, including a severe case of the flu. Unless immediately fatal, poisoning usually does not cause permanent damage; symptoms ordinarily subside after a couple of weeks. Plasma cholinesterase levels recover in about a month, red blood cell cholinesterase levels in three to four months.

Organophosphates have been used as insecticides by the agricultural industry since the late 1940's. Under worker safety regulations in effect in 1988, workers who load, mix, or apply organophosphates, including workers who direct crop dusters by flags, were required to be monitored by a physician. The baseline cholinesterase level must be established and then tested at least every 30 days. If workers suffered a 50 percent drop in plasma cholinesterase or a 40 percent drop in red blood cell cholinesterase they were directed to cease working with organophosphates.

There are no worker safety regulations addressed to field workers which require medical monitoring or establish standards for cessation of exposure to authorized organophosphates based upon blood cholinesterase levels. Worker safety for field workers is addressed by requirements for reentry intervals, prescribed periods of time that must pass between the application of the insecticide and entry into the affected field by workers.

Phosalone is an organophosphate which is the active ingredient in Zolone, an insecticide manufactured by Rhone-Poulenc Agricultural Company (Rhone-Poulenc). In 1987 use of Zolone to control leaf hoppers infesting grapes increased. Thereafter, around Labor Day, it came to the attention of officials at the Department that some field workers who had harvested grapes treated with Zolone were subsequently hospitalized with symptoms of organophosphate poisoning. The Department suspected that the illnesses were caused by Zolone and conducted an investigation. Blood tests of field workers harvesting grapes treated with Zolone were taken and a significant inhibition of cholinesterase was observed after one day of work in the fields.

On September 9, 1987, the Department issued an order prohibiting entry into fields treated with Zolone except as permitted by the director of the Department.

The harvest had just gotten underway and large quantities of table grapes and wine grapes had been treated with Zolone, several thousand acres. Rhone-Poulenc agreed to do whatever was necessary to get these grapes harvested. Grape harvesting presents a worst case for exposure to organophosphates because workers immerse their whole bodies in foliage treated with Zolone.

After negotiations with Rhone-Poulenc, the Department issued an order permitting entry into the affected fields for harvesting under stringent conditions. Field workers were required to be medically monitored and prohibited from further harvesting if red blood cell cholinesterase was depressed by 20 percent or plasma

cholinesterase was depressed by 25 percent. Workers were required to wear Tyvek fabric suits. Rhone-Poulenc paid several hundred thousand dollars to supply the protective suits and to defray additional expenses.

In February 1988 the Department informed Rhone-Poulenc that it intended to cancel the authorization for the use of Zolone in California. In response Rhone-Poulenc agreed to change the labeling of Zolone to prohibit its use on grapes and other crops harvested by hand and to "resticker" (with new labels) Zolone in the inventory of distributors, dealers and growers who could be reached through dealers. Under pesticide laws use of a product except as permitted by the label is unlawful.

Rhone-Poulenc was not convinced that Zolone had caused the illnesses reported in the 1987 grape harvest. It proposed to conduct a worker exposure study of the effect of Zolone on grape harvesters. There was a division of opinion within the Department concerning the need for such a study. Dr. Michael O'Malley, a physician in the medical toxicology unit of the Department, who had conducted an investigation of the 1987 illnesses, was confident that Zolone had caused the illnesses and believed the study was unnecessary. Notwithstanding this discord, planning and preparation for the Zolone study went forward.

Rhone-Poulenc solicited proposals from contractors to conduct the study. Dr. Baugher, and his company, Orius Associates, Inc. (Orius), the plaintiffs in this action, were awarded a $400,000 contract to perform the study. Dr. Baugher served as director of the study. Dr. Baugher has no medical training. He received his doctorate in 1978

in entomology, the study of insects. He worked in the pesticide field after his academic training and acquired expertise in insect toxicology. He established Orius in 1984 as an enterprise specializing in worker exposure studies and risk assessment.

Doctor Ronald Baron, a toxicologist employed by Rhone-Poulenc, telephoned Dr. Baugher about the study in April 1988 and soon thereafter sent him a written proposal, explaining, inter alia, that:

> "The broad parameters set forth below shall serve as a basis for more comprehensive discussions with technical personnel of the California Department of Food and Agriculture for defining a study protocol, and for selecting a prime contractor."

Dr. Baugher prepared a draft or preliminary protocol for the study in late April. Negotiations ensued between the Department and Rhone-Poulenc concerning the content of the study protocol which generated successive versions of it. Eventually the Department informed Rhone-Poulenc that it would not approve the protocol for use until Rhone-Poulenc obtained the approval of an independent physician of the biological monitoring portion and the criteria for removal of subjects.

Dr. Baron submitted the current draft of the protocol to physicians specializing in occupational health on the faculty of Duke University. They suggested various measures to increase the safety of the study participants. One suggestion was to set "pull out points" for the removal of study subjects when blood tests showed a 25 percent reduction in either their red blood cell cholinesterase or plasma cholinesterase. These suggestions were included

without attribution in materials furnished to Dr. Baugher by Dr. Baron for preparation of the ensuing version of the study protocol and Dr. Baugher included them in the edition, dated June 25, 1988.

Department officials eventually verbally informed Rhone-Poulenc that the study protocol was acceptable. On August 9, 1988, at the request of Rex Magee, the Department Deputy Director, Rhone-Poulenc's manager of Regulatory Affairs, Ronald Hanson, sent a letter to the Department summarizing the plan for conducting the study. The letter contains the assurance there would be "strict adherence" to the study protocol and asserts that Rhone-Poulenc will assume the study protocol is correct unless otherwise advised. The Department did not respond to the letter.

Before the harvesting portion of the study began Dr. Baugher knew there was a lot of media interest in the study. Quite a number of media representatives telephoned John Corkins of Research for Hire about the study. Research for Hire is a subcontractor which Dr. Baugher brought into the study to provide logistical and other services. Rhone-Poulenc directed that Corkins coordinate press coverage until their press person, Mary Ann Ford, arrived. One afternoon several media representatives came to Corkins's office and Dr. Baugher was "made availab'e" to answer questions in a television interview.

The first of six days of harvesting grapes treated with Zolone was August 15, 1987. The study compared harvesting of grapes in a vineyard treated with Zolone and a vineyard that was not treated with organophosphates.

Thirty harvesters were employed in the Zolone treated vineyard, twenty-two in the other.

Dr. Robert Krieger, chief of the Department's worker health and safety branch, observed the first day of harvesting. Blood samples were taken at the conclusion of the day. Two of the 52 harvesters showed depression of plasma cholinesterase greater than 25 percent. They were not removed from the study.

Rhone-Poulenc and Corkins held a press conference on the second day of harvesting to satisfy media interest and minimize disruption. On the day of the press conference the United Farm Workers marched in protest of the study. Caesar Chavez fasted in Delano, 10 miles away, to draw attention to the use of pesticides in grapes. All of the national large TV media, as well as that of the large California cities, covered the Caesar Chavez fast and attended the Zolone study press day, as did print media journalists.

Mary Ford, Rhone-Poulenc's press coordinator, read a prepared statement and introduced Drs. Baron, Krieger, and Baugher, among others. After a short presentation by Drs. Baron and Krieger, the media were allowed to conduct interviews. Dr. Baugher was questioned by several reporters. He made the following statements: the illnesses in 1987 (1) were "scientifically unexplainable," (2) "could not specifically be traced to Zolone," (3) and may have resulted from "lack of the proper time to dissipate [the Zolone] or too much was used," (4) Zolone affects the cholinesterase levels of insects, (5) animals could regenerate their cholinesterase levels in a few hours, and (6) he knew of no long term effects of Zolone.

By the end of the second day of the Zolone study four harvesters showed depression of plasma cholinesterase greater than 25 percent. They were not removed from the study. By the end of day three of the Zolone study nine harvesters showed depression of plasma cholinesterase greater than 25 percent. They were not removed from the study.

At the outset Dr. Baugher had not believed there would be more than a 25 percent depression of plasma cholinesterase, based on previous Zolone studies, so that the pull-out point based on this criterion would essentially not limit the conduct of the study. He considered the Duke University physicians' suggestions, added into the protocol, "to be a window-dressing by Rhone-Poulenc and the State, quite honestly." He responded to the unexpected increase in depression of plasma cholinesterase in the harvesters by amending the study protocol after day three to drop that measure as a criterion for removal from the study.

By the end of the fifth and penultimate day, 19 of the harvesters had a depression of plasma cholinesterase greater than 25 percent and would have been prevented from participating in the last day of harvesting under the former plasma cholinesterase pull-out criterion.

After the study was completed Dr. Baron and Dr. Baugher prepared a draft of a final report. In December 1988, Dr. Glenn Simon, Rhone-Poulenc's director of toxicology and Dr. Baron's supervisor, reviewed the draft. Examining the data provided led Dr. Simon to the discovery that the amendment to the study protocol had changed the pull-out criteria, permitting harvesters to

continue to work who would have been removed from the study under the original protocol. Dr. Simon informed his superiors of this and an investigation of the matter was conducted by Rhone-Poulenc and completed in February 1989. The details of what had occurred were related to Department officials that month.

On February 22, 1989, the Department issued a press release with the following text:

> "CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE INVESTIGATES CONDUCT OF PESTICIDE RESEARCHERS IN WORKER EXPOSURE STUDY
>
> "The California Department of Food and Agriculture announced Wednesday it is investigating the conduct of researchers who apparently violated approved procedures during a pesticide research project.
>
> "The August 1988 project studied field worker exposure to phosalone, manufactured under the trade name, Zolone, by Rhone-Poulenc Ag Co. of North Carolina.
>
> "CDFA began its investigation after learning last week from a report filed by Rhone-Poulenc that approved procedures had been changed during the study in which 30 volunteers picked grapes that had been sprayed with phosalone. Twenty-two others picked unsprayed grapes.
>
> " 'We were appalled to learn that scientists apparently violated the ethics of their profession in this way,' said James Wells, Special Assistant, CDFA's Pest Management Division. 'If true this constitutes an unbelievable breach of trust with

this department, and even more serious, with the volunteers who participated in the study.'

" 'Someone will be held accountable for this,' Wells said. 'Depending on the outcome of our investigation, we will consider administrative, civil or criminal action. Another option is to refuse to accept future studies from the researchers.'

"Several episodes of field worker poisonings in 1987 had prompted CDFA to conduct an extensive reevaluation of phosalone and potential worker exposure. Under pressure from CDFA, Rhone-Poulenc eliminated all uses of phosalone on hand harvested crops and commissioned the study to determine the degree of phosalone exposure to workers harvesting crops by hand.

"The research protocol – procedures to be followed during the study – was approved by CDFA. Under this protocol, any of the study's paid volunteers would be pulled from the project if daily blood tests showed effects of excessive pesticide exposure.

" 'Exposure to an organophosphate pesticide like phosalone may depress levels of cholinesterase enzyme in the blood,' said Dr. Robert Krieger, chief of CDFA's Worker Health and Safety Branch. 'Under the protocol, if worker's red blood cell or plasma cholinesterase levels showed a 25% depression, they were to be taken off the project.'

"The researchers, without notifying CDFA or study participants, changed the research protocol and failed to remove participants whose cholinesterase levels fell 25% or more below baseline.

" 'Had we known of this change,' Krieger said, 'we would have brought the study to an immediate halt.'

"According to the report, '19 of 30 persons in the experiment had more than a 25% plasma cholinesterase depression and should have been removed from the study,' Krieger said.

"One participant showed symptoms potentially related to exposure, Krieger said. These symptoms can include nausea, diarrhea and other symptoms similar to stomach flu. Krieger said, 'Evaluation of the cholinesterase levels in this individual by our staff did not indicate that the illness was likely to be related to exposure to phosalone. None of the other participants showed any symptoms, and all were observed by a physician. But as a result of the unapproved change in the study plan, the harvesters were more extensively exposed than anticipated.'

"Testing after the project ended indicated that plasma cholinesterase levels began to recover as soon as exposure ended.

" 'This is to be expected with this kind of pesticide exposure,' said Krieger.

'Depressed plasma cholinesterase serves to indicate excessive exposure that should not be continued.'

"As a result of this study Rhone-Poulenc is permanently withdrawing Zolone from use on hand-harvested crops. Use on nuts and ornamentals will be further evaluated since they involve substantially lower worker exposure."

The press release lists Veda Federighi, information officer, as a person to contact concerning the press release. Federighi had drafted the press release in concert with Wells and Dr. Krieger. She had no personal knowledge of the facts concerning the Zolone study other than the information she received from other employees such as Wells and Dr. Krieger. She believed that everything she put in the press release was true.

After the press release was issued Federighi spoke with Gary Sack, a radio reporter for the California Farm Bureau Federation, and Shawn Turner, a print reporter with Ag Alert, a widely circulated special interest newspaper for agri-business published by the California Farm Bureau Federation. She told them that "under investigation" were "study director, Doug Baugher; Orius Associates, Inc. of Frederick, M.D.; Research for Hire, Porterville; and Ron Barons, a Rhone-Poulenc representative who was working on the study." Turner used this quote in his March 1, 1989, story in Ag Alert about the Department's press release and Sack played a tape recording containing the quote in a radio broadcast over a network of 24 stations.

Within a day or so of interviewing Federighi, Sack interviewed Corkins of Research for Hire. Corkins told Sack how he was brought into the study, and they "went into" who the study director was. Corkins gave Sack the names of the participants in the study and discussed their roles in the conduct of the study. Sack did a radio broadcast presenting Corkins's and Rhone-Poulenc's side of the story.

Turner relied on Sack's work in preparing his print article. Sack told him he had talked to Corkins and they discussed the question of who ran the study in the field. In addition to interviewing Federighi, Turner interviewed Rhone-Poulenc's press coordinator, Mary Ford, and asked her who ran the study in the field. Among other things, Ford told Turner that Rhone-Poulenc had taken strong internal disciplinary measures, but "declined to elaborate because of privacy matters."

On September 7, 1989, the Department issued a second press release concerning its investigation of the Zolone study. The release recapitulates the Department's criticism of the conduct of the study contained in the first press release, characterizing the conduct of "Rhone-Poulenc, its on-site company monitor, and the study director" in changing the study protocol as "unprofessional." It announced the Department's conclusion that there were no apparent violations of state or federal law and that no legal enforcement action could be taken to sanction the conduct because of the nature of the existing regulations. It also announced that the Department had rewritten the regulations to correct the deficiency.

Dr. Baugher and Orius filed the complaint in this action on August 29, 1990, alleging defamation by the State, the Department, and Department employees, including Federighi and, as to Dr. Baugher, intentional infliction of emotional distress resulting from the republication in the media of aspersions contained in the Department's press releases and the identification of Dr. Baugher and Orius as the "researchers" criticized in the first press release.

When the matter came on for trial the court granted summary judgment in favor of the defendants on the ground of privilege under Civil Code section 47, subdivision (a) for statements made in the discharge of an official duty and a judgment on the pleadings in favor of the defendants on the ground privilege under Civil Code section 47, subdivision (b) for statements made in connection with an official proceeding.

We reversed the judgment in an unpublished decision, *Baugher v. Department of Food and Agriculture* (May 26, 1993) 3 Civ. C014178. We concluded that the privilege for official proceedings was inapplicable and that a triable issue of fact, whether the alleged falsehoods were made in the proper discharge of an official duty, precluded summary judgment on that claim of privilege. As to the claim of privilege for official duty we said that it only applies to high level officials and that Dr. Baugher claimed that his name had been given to the press by a "renegade, low-level Department employee."

After remand the matter came on again for trial. At the outset of trial the court conducted an evidentiary hearing to determine whether Dr. Baugher was a "public figure" for purposes of the constitutional requirement that, as to public figures, actual malice, knowledge that the defamation was false or made in reckless disregard of the truth, must be shown.

At the hearing Dr. Baugher testified there are always controversies and political implications in exposure and risk assessment studies, sometimes greater or lesser, but he did not factor that into his determination whether to take on such a project. He testified that he did not know

beforehand that the Zolone study was "highly politicized." He conceded he was aware from the outset that the illnesses in 1987 had been attributed to Zolone and stipulated that the subject of pesticides and pesticide studies had been a subject of continuing and major media interest. He argued that he should not be subject to the public figure characterization because he did not seek publicity and avoided it to the extent feasible. The trial court found that he was a "limited public figure" for purposes of comment upon his conduct in the course of the Zolone study.

Dr. Baugher conceded from the outset that the press releases had been approved at a sufficient level in the hierarchy of state government to render them privileged under Civil Code section 47, subdivision (a), as statements made in the proper discharge of an official duty. His counsel said: "if the press release had named my clients, we wouldn't be in court. . . . "

After the trial court ruled that the defamation claim is subject to the "constitutional malice" requirement, the State argued, in light of the concession of privilege, that the scope of the trial should be limited to the question of Federighi's malice. The State noted that she was the person who uttered the statement naming Dr. Baugher as one of the "researchers" made the subject of the Department investigation which resulted in the claimed injury to his reputation. Dr. Baugher replied that this limitation was inappropriate because the evidence would show a conspiracy between Federighi, Dr. Krieger, and Wells to injure him. The trial court opined that Dr. Baugher was entitled to pursue that claim.

A protracted trial ensued. In light of the issues presented in the appeal and cross-appeal and the nature of our resolution of those issues, we eschew a detailed account of the evidence concerning the myriad of side issues developed at trial. A brief and partial summary suffices.

Dr. Baugher attacked the assertions in the first press release that he had acted improperly in the conduct of the Zolone study on several fronts. He adduced, inter alia, evidence tending to show: (1) the Department never expressly or formally approved the Zolone study protocol; (2) Dr. Baugher did not participate in the negotiations between the Department and Rhone-Poulenc concerning the protocol and was not apprised of the representation in Hanson's letter to the Department promising strict adherence to the June 25th protocol; (3) study protocols are often amended by the signatories to the protocol and the Zolone study had only two signature lines under the heading "Approval," one for Dr. Baron and one for Dr. Baugher; (4) no study participant suffered symptoms of organophosphate poisoning and Dr. Baugher had a reasonable basis to conclude that dropping the use of a 25 percent depression in plasma cholinesterase as a pull-out criterion would not significantly increase the risk of poisoning of harvesters; (5) the Zolone study conducted by Dr. Baugher was superior to another Zolone study concerning nut crops conducted by the Department itself in 1988; and (6) Dr. Krieger was sent a copy of the amendment to the protocol dropping the plasma cholinesterase pull-out criterion soon after the study ended and inferably was aware of the specific nature of the amendment in mid-September of 1988.

Dr. Baugher also adduced evidence tending to show that Federighi acted contrary to Department policy in releasing the names of those under investigation and that as a result of the media reports concerning his role in the Zolone study his previously lucrative contracting work in the field of exposure studies ceased.

The Department responded to these evidentiary thrusts of Dr. Baugher and, among other things, attacked his conduct in performing the study on the additional ground that he had failed [sic] comply with the spirit of the provisions of the study protocol calling for physician monitoring.

In the course of discussing proposed instructions to the jury the State again raised the claim that the issue of "constitutional malice" should be limited to malice on the part of Federighi. The trial court rejected the proposed limitation, saying: "I think the evidence at least raises the inference that Veda Federighi was doing nothing more than parroting what was told to her by Mr. Wells and Mr. Krieger, [therefore] that the instructions, as given, [ ] include not only Veda Federighi but other employees, namely Krieger and Wells, is appropriate."

DISCUSSION

I

The logical place to begin is with Dr. Baughers's claim, in his protective cross-appeal, that the trial court erred in concluding that his conduct of the Zolone study renders him a limited purpose public figure subject to the "constitutional malice" requirement.

If he is correct, the State's appeal is truncated, since he need not prove "constitutional malice." Dr. Baugher argues that the trial court erred in characterizing him as a public figure because he did not seek out contact with the media and only responded to a few technical questions. The argument is unpersuasive and the contention of error is not meritorious.

The framework for determining whether the plaintiff is a public figure is found in the following passage from *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252-255:

> "In *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], the United States Supreme Court fundamentally altered judicial treatment of defamation actions by placing a significant constitutional limitation on the ability of a public official to recover damages for a defamatory falsehood. Emphasizing the importance of free expression and a free press under the First Amendment, the Supreme Court determined that 'public officials' may not prevail in an action for libel relating to their official conduct absent proof that the statement was made with 'actual malice.' [Citation.] Three years later, the court held that 'public figures' – like public officials – must also prove actual malice in order to recover in a defamation action. [Citation.] Though holding that the plaintiffs in the two cases before it properly fell under the aegis of 'public figures,' the court did not offer an encompassing definition of that term.

Further refinement of the concept was developed in subsequent United States Supreme Court decisions.

"In *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997], the court provided a twofold rationale for extending the *New York Times* rule to 'public figures.' First, it recognized that public figures are generally less vulnerable to injury from defamation because of their ability to resort to effective 'self help.' Such persons ordinarily enjoy considerably greater access than private individuals to the media and other channels of communication. This access in turn enables them to counter criticism and to expose the fallacies of defamatory statements. (418 U.S. at p. 344 [41 L.Ed.2d at p. 808].) Second, and more significantly, the court cited a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.' (418 U.S. at p. 345 [41 L.Ed.2d at p. 808]; [Citation].)

"Having thus explained the rationale for the public figure classification, the *Gertz* decision defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' (418 U.S. at p. 351 [41

L.Ed.2d at p. 812].) Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy. . . .

"The cases decided since *New York Times* and *Gertz* make it clear that a person or group should not be considered a 'public figure' solely because that person or group is a criminal defendant [citation]; has sought certain relief through the courts [citation]; or merely happens to be involved in a controversy that is newsworthy [citation]. Rather, as this court recognized in *Vegod Corp. v. American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763 [160 Cal.Rptr. 97, 603 P.2d 14], a 'public figure' plaintiff must have undertaken some *voluntary* act through which he seeks to influence the resolution of the public issues involved. As such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of a subsequent libel action.

"In sum, when called upon to make a determination of public figure status, courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies. As is reflected in the evolution of the public figure doctrine, from *Butts* through *Gertz, Firestone* and *Wolston*, such a determination is often a close question which can only be

resolved by considering the totality of the circumstances which comprise each individual controversy." (Fns. omitted.)

In reviewing the trial court's determination we view the record in the factual light most favorable to that determination. (See, e.g., *Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 204.) We will look to the entire record of the trial, as our concern is whether the action of the trial court was correct.

The following useful checklist of considerations bearing on the limited purpose public figure question is culled from the case law in Smolla, Law of Defamation (1994) § 2.09[4], p. 2-33:

"(1) The extent to which the 'controversy' preexisted the defamatory speech (the 'bootstrap' problem);

"(2) The effect of the 'controversy' on the interests of nonparticipants;

"(3) The level of voluntariness in the plaintiff's involvement in the controversy;

"(4) The plaintiff's access to channels of communication for counterspeech;

"(5) The degree of public divisiveness concerning the controversy;

"(6) The extent of the plaintiff's prominence in the controversy;

"(7) The extent of the plaintiff's efforts to attempt to influence resolution of the controversy;

"(8) The extent to which the plaintiff's public figure status continued to exist at the time of publication;

"(9) The extent to which the allegedly defamatory speech is geographically or institutionally limited to the area in which the plaintiff had achieved public figure status."

In this case the Zolone controversy existed before the defamatory speech had a significant effect on the interests of nonparticipants, and engendered a high degree of public divisiveness. Dr. Baugher, an affluent professional with some experience in the uses of media, had resources allowing him some access to channels of communication for counterspeech. He was not prominent in the preexisting controversy concerning Zolone. However he did engage in significant efforts to attempt to influence the controversy. He undertook the role of study director for a human exposure study that he and his client Rhone-Poulenc hoped would resolve the controversy in favor of the use of Zolone on grapes. In that capacity he responded to media questions in a manner calculated to cast doubt upon the view that Zolone was the cause of the illness suffered by grape harvesters in 1987.

Dr. Baughers's argument is addressed to the consideration of the level of voluntariness in his involvement in the controversy. He argues that his personal involvement with the media in conjunction with the Zolone controversy was passive rather than active; he only answered "technical" questions and only in response to having been sought out. However, assuming that Dr. Baughers's mild advocacy of the harmlessness of the product of his client when interviewed would not suffice, the argument

mistakes the reach of the limited purpose public figure doctrine.

The normative aspect of the doctrine is akin to assumption of the risk. (See, Smolla, Law of Defamation, *supra*, § 2.06, p. 2-22.) It is not limited to those who bask in the media spotlight, e.g., those who seek to resolve the controversy by publicizing a point of view as a spokesperson. Any affirmative actions by which the plaintiff has thrust himself into the forefront of a particular public controversy must be considered for their bearing on the question of voluntariness. Dr. Baughers's argument is refuted by the following observations in Smolla, Law of Defamation:

> "Plaintiffs sometimes advance the argument that they cannot properly be classified as public figures because they did not 'voluntarily' invite media attention, even though they may have voluntarily engaged in the activity out of which the media attention arose. Based on a popular misconception surrounding the public figure issue, this is an altogether spurious defense. Of course may plaintiffs find media attention undesirable, particularly unflattering attention, and do not volunteer for it. But just as the media is not permitted to bootstrap itself into creating its own defense by focusing attention on the plaintiff through the very speech alleged to be defamatory, the plaintiff is not permitted to avoid the strictures of the actual malice standard by protesting, 'I didn't want the attention.' The proper question is not whether the plaintiff volunteered for the publicity but whether the plaintiff volunteered for an activity out of which publicity would foreseeably arise." (Smolla, Law

of Defamation, *supra*, § 2.13[2], p. 2-40, fn. omitted.)

In light of these considerations and the totality of the circumstances concerning the Zolone controversy, including the controversial nature of the Zolone study itself, we conclude that the trial court did not err in finding that Dr. Baugher is a limited purpose public figure as to his conduct as director of the Zolone study. He was adequately placed on notice that his actions in that capacity would be subject to the risk of intense media scrutiny and commentary by partisans and observers of the controversy.

II

The State contends that the trial court erred in permitting the case to be submitted to the jury without limiting the issue of "constitutional malice" to the state of mind of Federighi, the Department employee who made the statement that the researchers identified in the first press release included Dr. Baugher. The State suggests that allowing the jury to return a damages verdict predicated on the "constitutional malice" of Dr. Krieger or Wells concerning the statements they originated which were contained in the press release is barred by the privilege which shields the press release. The State argues further that the evidence could not support a finding that Federighi knew that what she said was false or that she spoke in reckless disregard of potential falsehood.

Dr. Baugher makes no claim there is substantial evidence to support liability predicated upon "constitutional malice" on the part of Federighi. He replies that the trial

court was correct in permitting a liability verdict predicated upon the "constitutional malice" of Dr. Krieger or Wells. Dr. Baugher argues that one who originates a defamatory statement is liable for injury attributable to the republication of the statement by a third party, citing *Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71. He also argues that liability is appropriate because Federighi changed the privileged statements in the first press release by adding to them his identity, and Dr. Krieger and Wells "participated" in this alteration because Federighi learned Dr. Baughers's identity from them, citing *Spitler v. Children's Institute International* (1992) 11 Cal.App.4th 432.

Neither of Dr. Baughers's arguments is persuasive, and we will conclude that the State's contention that the trial court erred in failing to limit the issue of malice to Federighi is meritorious.

The first consideration is the nature of the privilege under Civil Code section 47, subdivision (a) for statements made in the discharge of an official duty. The privilege was initially recognized as to officials in the executive branch of government in *Saroyan v. Burkett* (1962) 57 Cal.2d 706. In that case plaintiff, an attorney previously employed by the Superintendent of Banks, alleged that the superintendent had falsely and maliciously impunged his competency in performing that employment. The California Supreme Court upheld a judgment on the pleadings in favor of the superintendent on the ground that his remarks were absolutely privileged under the predecessor statute of Civil Code section 47, subdivision (a).

The appeal in *Saroyan* turned upon the question whether the statutory term "proper discharge of an official duty" meant that executive officials have an absolute privilege or a conditional privilege. The opinion explains that the question of meaning could not be resolved based upon the statutory text and history and that the "solution must be found by considering the treatment of the subject in the law generally." (57 Cal.2d at p. 710.) In the law generally the Supreme Court found recognition of an absolute privilege for federal and state officials of high rank, e.g., the governor and state officers analogous to cabinet level officials of the federal government. (*Ibid.*, citing e.g., Rest. Torts, § 591.) The Superintendent of Banks was found to be such an official and consequently, despite the allegation of malice, the judgment of dismissal was affirmed. (57 Cal.2d at pp. 710-711.)

As related, the State submits that because the press release was concededly privileged under Civil Code section 47, subdivision (a), as a statement authorized by an equivalent to cabinet level official, statements made by Dr. Krieger and Wells which were included in the press release are derivatively within the same privilege. The State suggests that the absolute privilege for statements of high government officials would be ineffectual if staff members who provided the information upon which the high level officials relied could be sued for republication of their statements used in an authorized privileged press release.

As a practical matter, the statements of high ranking executive officials can invariably be traced to factual information provided by their subordinates. In the light of statutes which require indemnity of public employees

for acts occurring in the scope of employment (e.g., Gov. Code, § 825), the absolute privilege has virtually no impact if the officials' statements can be traced to their lower ranking employees. The sting of damages for defamation and the deterrent effect on the freedom of action of high-ranking officials will be the same regardless whether liability results directly from the privileged statement or derivatively through the antecedent statements of lower ranking employees upon which it is founded.

Accordingly, we find the State's derivative privilege argument persuasive. (Also see, e.g., 2 Harper, James, and Gray, Law of Torts (2d ed. 1986) § 5.23, p. 199: "Persons . . . reporting to high-ranking executive officers concerning matters within their jurisdiction enjoy the same privilege as the officer himself." (Fn. omitted.))

Perhaps the persuasiveness of the State's general argument of derivative privilege is why Dr. Baugher does not squarely join issues with it.[1] Dr. Baugher does not

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[1] We note that in *Neary v. Regents of University of California* (1986) 185 Cal.App.3d 1136, 1145-1147, the court of appeal held that veterinarians of the University of California who prepared a report which was released by a vice chancellor under circumstances claimed to be within the official duty privilege were not derivatively protected by that privilege. We imply no view on the holding in *Neary*; we distinguish *Neary* on the ground that the privilege in issue in that case is dissimilar.

Neary is a case concerning extension of the official duty privilege recognized in *Saroyan v. Burkett* to lower ranking executive officials, predicated on the reasoning in *Sanborn v. Chronicle Publishing Co.* (1976) 18 Cal.3d 406. (See, e.g., *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 501.) As to such officials, the

address the matter as predicating liability on the pre-press release statements of Dr. Krieger and Wells. He argues that regardless of the privileged character of the statements used in the press release when Federighi identified him as a researcher under investigation she republished the antecedent defamatory remarks of Dr. Krieger and Wells and they should be held liable for that post-press release republication.

Dr. Baugher notes the general rule that: "[A] party has a cause of action for libel each time the defamatory matter is published, even if the originator of the defamatory matter did not republish the defamatory matter, as long as republication should have been reasonably foreseeable by the originator." (*Schneider v. United Airlines, Inc, supra,* 208 Cal.App.3d at p. 77; see also Rest.2d Torts, § 576.)

This argument provides too much. If the general rule concerning republication pertained to the particular circumstances giving rise to the official duty privilege for

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privilege is only available when the conditions for statutory immunity for discretionary acts under Government Code section 820.2 are met. (*Sanborn, supra,* at pp. 414-416.) *Neary* holds that in view of this limited scope of the privilege available to lower ranking executive officials it "should be no broader than necessary to protect appropriate officials when they are engaged in policymaking." (185 Cal.App.3d at p. 1146.) However, as to cabinet equivalent officials the privilege is applicable to all publications made in the performance of official duties. (See, e.g., Rest. 2d Torts, § 591; c.f., e.g., *Kilgore v. Younger* (1982) 30 Cal.3d 770, 782.) For the reasons given in the text, the broader privilege for cabinet equivalent officials requires extension to subordinates.

high ranking government officials, it would be immaterial whether Federighi played any role in identifying Dr. Baugher. If Federighi had refused to divulge the identities of the researchers under investigation and the reporters interested in the press release had derived that information from earlier press accounts, Corkins, or Rhone-Poulenc, a republication would subject the State to liability. Indeed, if the press release contained the names of the researchers, a foreseeable republication in the press of the statements provided by lower ranking employees would suffice for liability.

The general rule pertaining to republication does not apply in this particular context.

Dr. Baughers's other argument is that liability for the statements of Dr. Krieger and Wells used in the press release can be predicated upon the consideration that Federighi "changed" the concededly privileged statements made in the press release. Dr. Baugher relies on the following passage from *Spitler v. Children's Institute International, supra,* 11 Cal.App.4th at page 440:

> "The privilege set forth in section 47(b) applies to 'any' legislative proceeding. The use of the term 'any' necessarily requires that its application be construed broadly and it certainly applies to congressional testimony. Plaintiff does not argue otherwise. She seems to contend, however, that the *republication* of MacFarlane's testimony in the local press, which in certain respects inaccurately reported the original testimony, was itself defamatory. In order to establish a cause of action against the defendants based on republication of an originally privileged communication, the plaintiff must allege

> that the republication was authorized, consented to, or participated in, by the defendants. If the privileged statements are changed in the republication, then the plaintiff must allege that the defendants authorized, consented to, or participated in the publication of the article as changed. (*Montandon v. Cox Broadcasting Corp.* (1975) 45 Cal.App.3d 932, 937 [120 Cal.Rptr. 196].) MacFarlane denies so doing, and plaintiff submits no evidence to contradict MacFarlane (and indeed does not even allege that MacFarlane consented to or participated in the republication)." (Orig. emphasis.)

Dr. Baugher suggests that this passage supports liability because Federighi's disclosure of his identity "changed" the statements in the press release and Dr. Krieger and Wells "participated" in changing the statements because they were the source of Federighi's knowledge of his identity.

The words Dr. Baugher extracts from *Spitler* concern the question of responsibility when one person makes statements that are not defamatory and a second person alters the content of those statements to make them defamatory and then publishes them. (See. e.g., *Montandon, supra.*) Dr. Baugher argues that is the case because without the information concerning his identity the words in the press release would not have been actionable, regardless of privilege. He suggests that is so because a complaint for defamation is insufficient where the publication does not defame an ascertainable person. (See, e.g., *Harris v. Curtis Publishing* (1942) 49 Cal.App.2d 340, statement that the population of Laguna Beach

includes several hundred communists insufficient to libel local school board member.)

The analogy is unpersuasive because the class of persons disparaged in the press release, researchers involved in the Zolone study, is so small that it could reasonably be understood to refer to Dr. Baugher, hence those statements were otherwise actionable as defamation but for the privilege. (See, e.g., Rest.2d Torts, § 564A and comments.)

In addition, "participation" in rendering a non-defamatory statement defamatory connotes some active, purposeful role in bringing about the transmutation. From all that is made to appear, neither Dr. Krieger nor Wells conspired with Federighi to injure Dr. Baugher not used her as an agent for the purpose of achieving that harm, i.e., directed or induced her to make an improper disclosure of Dr. Baughers's identity that otherwise would not have occurred.

In sum, we find no persuasive reason to reject the State's claim that liability for defamation cannot be predicated upon the defamatory statements of Dr. Krieger or Wells which were published under absolute privilege in the press release. Accordingly, the presence or absence of "constitutional malice" on their part in making those statements cannot be used as a predicate of liability. There is no tenable claim that Dr. Krieger or Wells's additional statement, not privileged by use in the press release, that Dr. Baugher was one of the researchers responsible for the conduct which the press release disparaged was false or made in reckless disregard of possible falsehood.

Accordingly, proof of a defamation predicated on Federighi's statement to the press identifying Dr. Baugher as one of the researchers who the press release announced was under investigation requires a showing of "constitutional malice" on her part. The same barrier must be traversed for recovery of damages for intentional infliction of emotional distress by means of such disparaging remarks. (See, e.g., *Blatty v. New York Times* (1986) 42 Cal.3d 1033, 1044-1045.) Whether the evidence in a defamation case shows "constitutional malice" under the requisite clear and convincing evidence standard is subject to de novo review in this court. (E.G., *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842.)

The question of Federighi's malice is perfunctory. As related, Dr. Baugher makes no claim that Federighi was aware of the falsity of any of the assertions in issue or recklessly disregarded the truth of those assertions. In arguing to the jury his counsel conceded she "knew nothing" and was "pretty much [an] innocent person." The only significant information she supplied the press that was not contained in the privileged press release was the identity of the researchers on the Zolone study and that information was true.

For these reasons Dr. Baugher cannot show "constitutional malice" on the part of Federighi. In light of the foregoing conclusions, none of the other points raised by the parties warrant discussion.

DISPOSITION

We conclude that Dr. Baughers's only viable theory of liability for defamation is barred by an insurmountable

hurdle and that the judgment in his favor and in favor of Orius Corporation must be reversed. Reversal with directions that the trial court enter a judgment for the appellant is appropriate when, as here, it appears: "that on no theory grounded on reason and justice could the party defeated on appeal make a further substantial showing in the trial court in support of his cause." (*Davis v. Chipman* (1930) 210 Cal. 609, 623, internal quotation marks omitted.) The judgment is reversed with the direction that the trial court enter judgment for the defendants. The State shall recover its costs on appeal.

/s/ BLEASE, Acting P.J.

We concur:

/s/ SPARKS, J.

/s/ NICHOLSON, J.

APPENDIX B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DOUGLAS G. BAUGHER et al., Plaintiffs and Appellants, v. DEPARTMENT OF FOOD AND AGRICULTURE, Defendant and Respondent.	C014178 Super. Ct. No. CV515997) (Filed May 26, 1993)

This is an action for damages arising out of alleged defamatory statements made to the press by employees of the Department of Food and Agriculture about Douglas Baugher in the course of investigating Baugher's performance of a pesticide study.

The Department moved for summary judgment on the ground the challenged publications were made in the proper discharge of official duty and thus privileged (Civ. Code, § 47, subd. (a)). A law and motion judge denied the Department's motion, finding a triable issue of fact on the extent, if any, to which the challenged publications were properly authorized.

The Department then moved for judgment on the pleadings on the ground the challenged publications were made by a Department employee within the scope

of his or her employment and in the course of an official proceeding (Civ. Code, § 47, subd. (b) [privileged publication]; Gov. Code, § 821.6 [public employee immunity from liability]). The law and motion judge denied this motion, too, and the case was set for trial.

On the first day of trial, before a different judge, the Department, at the judge's invitation, renewed both its prior motions. The court granted them both on the grounds urged and entered judgment for the Department. Baugher appeals.

We will conclude the trial court erred in granting the Department's motion for summary judgment, because there is a triable issue of fact whether any of the alleged falsehoods were made in the proper discharge of an official duty. We will further conclude the court erred in granting the Department's motion for judgment on the pleadings, because the challenged publications were not an integral part of a covered official proceeding, thus the asserted privilege and immunity do not apply. Accordingly, we will reverse the judgment.

Facts

In 1988, Douglas Baugher, of Orius Associates, Inc., directed a study to evaluate the effects on grape harvesters of residues of the pesticide phosalone.

In February 1989, and again in September 1989, Department employees, in the course and scope of their employment, made oral and written statements to the press that Baugher, in conducting the study, violated

Department approved procedures, exposed study participants to excessive levels of phosalone, violated professional ethics and breached a position of trust with the Department.

The February 1989 publication was made in the context of announcing an investigation into Baugher's conduct of the study and to determine whether it warranted administrative, civil or criminal action. The September 1989 publication was made in the context of announcing the results of the investigation – Baugher's conduct of the study, although unprofessional and unethical, apparently violated no law, so Department regulations would be rewritten to provide stricter oversight of future research projects and to make sure breaches of the sort Baugher committed can be prosecuted.

Baugher's complaint against the Department alleges the Department's disparaging remarks were false and injurious.

For purposes of the summary judgment motion, the Department concedes there are triable issues of fact on the truth or falsity of the publications. For purposes of the motion for judgment on the pleadings, the complaint's allegations are deemed true.

Discussion

I

On appeal, Baugher attacks the summary judgment on assorted procedural and substantive grounds. Dispositive is his contention that there is a triable issue of fact

whether any of the alleged falsehoods was made in the proper discharge of official duty.

Whether there is a triable issue of material fact (see Code Civ. Proc., § 437c) is determined by the pleadings and the substantive law relating to the case. (See Pultz v. Holgerson (1986) 184 Cal.App.3d 1110, 1114.) "The complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action." (FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 381.)

All the claims in Baugher's complaint turn on alleged defamations, injurious falsehoods, that low-level Department employees, in the course and scope of their employment, publicly maligned Baugher's work and his character in written and oral statements to the press. The Department answered and, by affirmative defense, put in question whether the publications were privileged as ones made in the proper discharge of official duty (Civ. Code, § 47, subd. (a)).

The Department's summary judgment motion was grounded solely on that privilege. In support of its application, the Department claimed that the written press releases of February 1989 and September 1989 were authorized by the Department's director,[1] that Baugher's role as the key researcher involved in the pesticide study was contained in a public document (a protocol for the

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[1] This was attested to by Jack Parnell, the Department's director in February 1989, and by Henry Voss, the Department's director in September 1989.

study),[2] that it is Department policy to provide the press, upon request, information contained in public documents,[3] and that Baugher's name was known to the press in any event.[4]

Baugher's response challenged the application of the privilege, pointing out that newspaper accounts of the study at the time it was conducted did not identify Baugher's connection with the study, that the Department's February and September 1989 press releases deliberately omitted names, that it is Department policy not to mention names while investigations are pending, and that Baugher's name was given to the press by a renegade, low-level Department employee.[5]

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[2] The Department submitted a copy of the protocol, which names Baugher as study director, but which also names several other persons who were involved in the project.

[3] This was attested to by the Department's directors during the relevant time periods.

The written press releases did not identify Baugher by name but simply castigated the "researchers" who conducted the pesticide study. When the press followed up by asking the Department who the "researchers" were, the Department's information officer specifically named Baugher.

[4] In support of this the Department submitted a newspaper article from the *Porterville Recorder* in which Baugher was interviewed at the time the study was conducted in August 1988 (but in which Baugher's connection, if any, to the conduct of the study is left undefined).

[5] This was supported by deposition testimony of the deputy director involved in this matter that it is Department policy not to "name people's names while investigation is going on," in either written or oral publications, even if the name is contained in a public document, and by testimony that the Department's information officer has no independent authority

In specifying its reasons for granting summary judgment (see Code Civ. Proc., § 437c, subd. (g)), the trial court said the February and September 1989 press releases were privileged because they "were issued under the authorization of the Director of the California Department of Food and Agriculture in an official act." The court said further that the information officer's disclosure of Baugher's name as the target of the Department's investigation was swept within that privilege because Baugher's name was a matter of public record and was known to the press in any event.

Baugher's complaint charges defamation, defined as "false and unprivileged" publications. (Civ. Code, §§ 45, 46.) The papers submitted on the summary judgment motion call into question only the second element of that equation, specifically the application of Civil Code section 47, subdivision (a) (section 47(a)), which provides, "A privileged publication or broadcast is one made [i]n the proper discharge of an official duty."

Section 47(a) applies only to "high-ranking state and federal officials, such as the President of the United States, the governor of any state or territory, cabinet officers of the United States and the corresponding officers of any state or territory." (Sanborn v. Chronicle Pub. Co. (1976) 18 Cal.3d 406, 412-413 [applicable to county clerk]; Kilgore v. Younger (1982) 30 Cal.3d 770, 778 [applicable to state attorney general]; Saroyan v. Burkett (1962) 57 Cal.2d 706, 710 [applicable to state superintendent of

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to release information to the press and acted contrary to Department policy in telling the press Baugher was the target of the Department's investigation.

banks]; Frisk v. Merrihew (1974) 42 Cal.App.3d 319, 323 [not applicable to a local school superintendent or secretary of a school board]; White v. State of California (1971) 17 Cal.App.3d 621, 627-628 [not applicable to employees of state Department of Justice's Bureau of Criminal Identification].) Thus, although section 47(a) might protect the Department's director and his immediate deputies from liability for injurious falsehoods uttered in the proper discharge of official duty, it does not protect the Department from the conduct of its information director, who is the key player in this controversy in any event because it was she who, in the course and scope of her employment, on her own initiative and, according to Baugher's evidence, without authority and contrary to Department policy, told the press that the Department's investigation of allegedly wayward "researchers" was targeting Baugher in particular.

Whether or not the February and September 1989 press releases were, because authorized by the Department's director, privileged libel, this does not answer the question whether the information director's oral (and most damaging, because they specifically tied the allegations of wrongdoing to Baugher) remarks to the press were privileged slander. Under section 47(a), they were not.

The trial court's reason for sweeping the information director's publication within the scope of section 47(a)'s privilege is, in effect, that her alleged defamations were inconsequential – the press would have discovered Baugher's connection to the pesticide study in any event. Notions of consequence do not go to privilege, however; they go to causation and damages, issues not raised by

the Department in its motion and issues that the papers submitted on the motion do not resolve.[6]

Moreover, it is not enough, to protect one from liability, to say a defamatory publication was made simply in the discharge of official duty (here, authorized by the Department's director); it must have been made, in the language of section 47(a), in "the *proper* discharge of an official duty." (Emphasis added.) That means made by a protected official *in the course of his policy-making, and not simply ministerial, functions.* (Kilgore v. Younger, supra, 30 Cal.3d at p. 781; Sanborn v. Chronicle Pub. Co., supra, 18 Cal.3d at p. 413; Saroyan v. Burkett, supra, 57 Cal.2d at pp. 710-711.) Whether, by this measure, the Department's statements to the press were *proper* is a point that seems to have been overlooked here. Although the mere decision by a public official to make a statement to the press might be considered the exercise of a policy-making function, "the timing of any particular release, the content of any particular release, and the manner in which a release is made constitute the implementation of the policy, more properly described as the operational aspect of the policy, and are not entitled to . . . protection. . . ." (Toney v. State of California (1976) 54 Cal.App.3d 779, 792-793 [applying

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[6] The Department's protocol includes the names of several persons connected with the pesticide study, but the Department's information officer told the press that Baugher in particular was the target of the Department's investigation. The newspaper article in which Baugher was interviewed at the time the study was being conducted in August 1988 identified him only as "of Orius Associates Inc. Laboratories in Maryland. . . ." The article left his connection with the study, and in particular his role as the study's director, undefined.

Gov. Code, § 820.2, which makes discretionary acts of public employees immune from liability, and which also employs the policy/ministerial act distinction in its application (see Sanborn v. Chronicle Pub. Co. supra, 18 Cal.3d at pp. 413, 414-416)].)

II

Baugher attacks the judgment on the pleadings, contending that the trial court improperly took judicial notice of matter outside the pleadings and that the court was, in any event, wrong on its application of the asserted privilege (Civ. Code, § 47, subd. (b)) and immunity (Gov. Code, § 821.6). We agree that, even considering the truth of the matter the court noticed,[7] the court incorrectly applied the law.

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[7] The Department asked the court to consider Baugher's petition for relief in this case from the claim filing requirements of the Tort Claims Act. In those documents, Baugher asserted the falsehoods were uttered in the context of an investigation by the Department into whether Baugher violated any law, an investigation Baugher expected would clear his name rather than result in further attacks on his work and his character. Moreover, the written press releases that contain the alleged defamatory remarks, writings essential to Baugher's libel claim and which were submitted by Baugher in his papers opposing the Department's prior summary judgment motion, show the remarks were made in the context of announcing an investigation by the Department into possible wrongdoing and then the results of that investigation. Thus, to the extent this context of the alleged falsehoods is not or cannot be disputed, there is authority for the proposition the matter may be considered for its truth on a motion of this sort, even though the matter is outside the pleadings. (See Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal.App.3d 369, 374-376.)

A.

Civil Code section 47, subdivision (b) (section 47(b)) provides, in pertinent part, that an injurious falsehood is privileged if it is made "[i]n any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [Code of Civil Procedure sections 1084 et seq., governing traditional writ of mandate]. . . . "

The purpose of section 47(b), by removing the threat of liability, is to foster the conduct of official proceedings designed to ascertain the truth. "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (Silberg v. Anderson (1990) 50 Cal.3d 205, 212; see also Block v. Sacramento Clinical Labs, Inc. (1982) 131 Cal.App.3d 386, 393-394.)

A privileged communication may occur outside of and preliminary to the official proceeding so long as, consistent with the privilege's purpose, the communication is an integral part of, not collateral to, the proceeding. (See, e.g., Block v. Sacramento Clinical Labs, Inc., supra, 131 Cal.App.3d 386 [toxicologist's communication of information to the district attorney, at the district attorney's request, in furtherance of an investigation into probable cause for initiating a criminal complaint]; Imig v. Ferrar (1977) 70 Cal.App.3d 48, 54-57 [citizen's complaint to police department about misconduct of one of

its officers designed to prompt an official disciplinary proceeding].)

In line with these rules, it is generally held that a defamatory publication to a nonparticipant in a covered proceeding is generally not privileged under section 47(b) and is therefore actionable unless privileged on some other basis. (Silberg v. Anderson, supra, 50 Cal.3d at p. 219.)[8] Thus, section 47(b) does not operate to privilege defamatory remarks made to the press by a participant in a proceeding to which that section applies. (Washer v. Bank of America (1943) 21 Cal.2d 822, 831-833 [a party to a labor dispute before the NLRB is not privileged by section 47(b) to defame the other party in remarks to the press]; Susan A. v. County of Sonoma (1991) 2 Cal.App.4th 88, 93-96 [a witness in a judicial proceeding is not privileged by section 47(b) to defame a party in remarks to newspaper and television reporters]; Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal.App.3d 818, 823-828 [a party to a personal injury action is not privileged by section 47(b) to defame the other in remarks to newspaper and television reporters; "[one] who wishes to litigate his case in the press will do so at his own risk. . . . "])

This case falls squarely within that line of authority. The Department's publications are not privileged under section 47(b).

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[8] We express no opinion whether the Department's publications might be privileged on some basis other than that which the Department urges.

B.

Nor is the Department immune from liability because of Government Code section 821.6, which provides, "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."[9]

Like the rule governing the application of section 47(b), immunity from liability under Government Code section 821.6 is predicated upon a communication which is an integral part of the covered proceeding. (Kayfetz v. State of California (1984) 156 Cal.App.3d 491, 498 & fn. 10.)

Under certain circumstances, Government Code section 821.6 may be applied to hold not actionable defamatory remarks contained in a public entity's statements to the press. Thus, in Kayfetz v. State of California, supra, 156 Cal.App.3d 491, the Board of Medical Quality Assurance took formal disciplinary action against a physician, subsequently setting aside its decision and dismissing the accusation after the physician successfully completed a drug diversion program. In the interim, the Board published its quarterly "Action Report" that listed the disciplinary action taken against the physician. The court said that, because the disciplinary action was still open at the time the publication was made, the publication was an integral part of the prosecution process, observing that

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[9] If a public employee is immune from liability under Government Code section 821.6, then so is the public employer. (Gov. Code, § 815.2.)

the Board, as part of the Department of Consumer Affairs, is charged by statute with disseminating information to the public on practices inimical to the interests of consumers (see Bus. & Prof. Code, § 335). (156 Cal.App.3d at pp. 496-498; see also Citizens Capital Corp. v. Spohn (1982) 133 Cal.App.3d 887, 889 [newspaper publicity reporting results of Department of Consumer Affairs investigations of collection agencies and the revocation action based on those investigations].)

In Cappuccio, Inc. v. Harmon (1989) 208 Cal.App.3d 1496, the plaintiffs had been found guilty in criminal proceedings of underweighing fish. The Department of Fish and Game announced the convictions to the public and, in so doing, grossly misstated the amount by which the fish had been underweighed. The question for the court was whether the public announcement, having come after the judicial proceeding concluded, could be said to have been part of its institution or prosecution within the meaning of Government Code section 821.6. The court held that the outcome of a judicial proceeding is as much a part of its process as its institution or prosecution. The court observed that the outcome in the case was of vital concern to fishermen, and "dissemination of information is not possible without protecting the publication of the results of prosecutions for violations of the Fish and Game Code." (*Id.* at pp. 1498-1500.)

These cases are distinguishable and lend no support to the Department's position here. Each case involved the actual prosecution of, and not merely threatened, judicial or administrative disciplinary proceedings against the persons allegedly injured by the challenged publications.

Here, the Department publicly announced an investigation into what it said was unprofessional and unethical conduct by Baugher that might possibly be in violation of law, then publicly announced its chagrin that there were in fact no judicial or administrative remedies available to punish such conduct. In no sense is this "instituting or prosecuting any judicial or administrative proceeding" as contemplated by Government Code section 821.6. As in the analogous section 47(b) cases, this is unprotected "trial by press."

The judgment is reversed and the cause remanded to the superior court with directions to enter new and different orders denying the Department's motion for summary judgment and for judgment on the pleadings. Baugher shall recover his costs on appeal.

BLEASE, Acting P. J.

We concur:

SPARKS, J.

DAVIS, J.

APPENDIX C

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

(Filed Apr. 18, 1996)

DOUGLAS G. BAUGHER et al., Plaintiffs and Appellants, v. STATE OF CALIFORNIA et al., Defendants and Appellants.	C018626 & C018843 (Super. Ct. No. CV515997) OPINION ON DENIAL OF PETITION FOR REHEARING

Dr. Baugher petitions for rehearing making several contentions. Two of them warrant discussion: (1) that the opinion disposing of this appeal violates the doctrine of law of the case, (2) that the opinion does not distinguish this case from governing precedents on the issue of the limited purpose public figure doctrine. Neither contention is meritorious.

I

Law of the Case

Dr. Baugher argues that we have violated the doctrine of law of the case. We disagree. On no point of law in the present opinion do we differ from a point of law advanced in our earlier opinion.

As related in our earlier opinion in this case, *Baugher v. Department of Agriculture* (May 26, 1993) 3 Civ. C014178 (hereafter 3 Civ. C014178), the appeal arose from a summary judgment in favor of the state. We ruled the summary judgment was infirm because it was based on the causal proposition that Dr. Baugher's identity would inevitably have been discovered regardless of the statements identifying him by the state's press officer, Federighi. We said that was an issue "that the papers submitted on the [summary judgment] motion do not resolve." (3 Civ. 14178, at p. 8.)

We went on to opine that the issue of privilege regarding Federighi's statements, "the key player" (*Id.* at p. 7) and a "renegade low-level Department employee" (*Id.* at p. 5) under Dr. Baugher's existing theory of the case, turned on whether she was engaged in policy-making as opposed to ministerial functions (*Id.* at p. 8). We decided that the issue presented a triable issue of fact. (*Id.* at p. 2.)

In the subsequent trial Dr. Baugher departed from the theory advanced in the earlier appeal. Federighi was now an innocent party to the publication. The malefactors were Wells and Dr. Krieger, other Department employees who had been involved in the preparation of the concededly privileged press release.

In the opinion resolving the present appeal, *Baugher v. State of California* (March 19, 1996) 3 Civ. C018626 & C018843 (hereafter 3 Civ. 18626), we were called upon to resolve questions of the constitutional malice vel non of Federighi which were not raised in the earlier appeal. This presented a derivative question, also not tendered on the first appeal, whether liability could be predicated on statements uttered by Wells and Dr. Krieger in the course of preparing the privileged press release. We answered that those utterances, not in issue in the first appeal, were subject to the privilege.

Dr. Baugher argued that these statements give rise to liability under the case law pertaining (a) to republication of defamatory statements and (b) to loss of the privilege in republication by alteration of the privileged statement. We found the first claim unpersuasive because it proved too much; any republication of the press release that occasioned harm to Baugher's reputation would suffice for liability. (3 Civ. C018626, at pp. 31-32.) We found the second claim unpersuasive, in part, because Federighi did not meet a requirement of the case law, upon which Dr. Baugher relied, that the privilege is lost by the alteration of a non-actionable statement into an actionable statement. (3 Civ. C018626, at pp. 33-34.)

A.

The doctrine of law of the case applies to points of law necessarily involved in the former decision. It does not apply to dicta, nor to questions of sufficiency of the evidence where the evidence is substantially different in the second proceeding, and it does not apply to a point of

law that could have been presented in the first appeal but was not. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 743, 750, 752.)[1]

Dr. Baugher first argues that the doctrine of law of the case requires a "consistent" decision regarding: "the significance of the information supplied by Veda Federighi to the media and the consequences of the publication

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[1] The most recent extended pronouncement of the Supreme Court on law of the case is *Searle v. Allstate Life Ins. Co.* (1985) 38 Ca1.3d 425, pages 434-435:

"As noted by this court, however, the 'doctrine of law of the case . . . is not inflexible.' (*Davies v. Krasna, supra,* at p. 507, fn. 5.) In *England v. Hospital of Good Samaritan* (1939) 14 Ca1.2d 791 [97 P.2d 813], a third appeal was taken to this court and we departed from the rule of law of the case noting that 'a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former appeal. Procedure and not jurisdiction is involved. Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before.' (*Id.*, at p. 795.) But '[i]n the absence of exceptional circumstances of hardship and injustice the need for attributing finality to considered judicial determinations compels adherence to the previous decision.' (*Gore v. Bingaman* (1942) 20 Ca1.2d 118, 123 [124 P.2d 17].) Though we have recognized that the rule will be disregarded when necessary to avoid an 'unjust decision' (e.g., *DiGenova v. State Board of Education* (1962) 57 Ca1.2d 167, 179 [18 Cal.Rptr. 369, 367 P.2d 865]), that exception must rest on 'a manifest misapplication of existing principles resulting in substantial injustice' and not on mere disagreement with the prior appellate determination. (*People v. Shuey, supra,* 13 Ca1.3d 835, 846.)"

The *Searle* court then opines that: "The primary purpose served by the law-of-the-case rule is one of judicial economy." (*Ibid.*)

of Dr. Baugher's name." The point of law determined in the earlier opinion concerns the application of the privilege of Civil Code section 47, subdivision (a), for lower level government employees to the defamatory statements of a renegade, low-level media spokesperson, Federighi. One of the key points of law determined in the present opinion concerns the application of the privilege for statements of high ranking government officials to subordinates who are the source of such statements, i.e. statements of Wells and Krieger uttered in the course of preparing the privileged press release. The other is whether the republication of the privileged statements, in connection with the truthful statement of Dr. Baugher's identity by Federighi (now an innocent), pass the constitutional test of malice. These points of law differ from that decided in our earlier opinion and, for that reason, the doctrine of law of the case is not applicable.

B.

Dr. Baugher's other law of the case arguments pertain to the finding in the earlier opinion that it was a triable issue of fact whether Dr. Baugher's identity *would* have been discovered independent of Federighi's statements.[2]

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[2] Dr. Baugher does not note that the earlier determination was limited to the state of evidence in the summary judgment proceedings. That does not prevent the matter from being incontrovertibly established by different evidence in the record of a subsequent full blown trial. However, we did not and need not reach that question.

Baugher argues that we contradicted this finding in responding to his arguments about republication, i.e., in saying that the press release statements were actionable because his identity *could* have been discovered and in saying that if his argument were correct the damage inflicted by the statements would be actionable *if* his identity was discovered independent of the Federighi statements. There is no contradiction; what *would* have happened differs from what *if* or what *could* have happened.

II

Dr. Baugher contends that our discussion of the limited purpose public figure doctrine in the present opinion fails to respond to and distinguish an authority he cites, *Hutchinson v. Proxmire* (1979) 443 U.S. 111 [61 L.Ed.2d 411]. Hutchinson was derided in the Golden Fleece Award by Senator Proxmire for taking government grant money for research on the emotional behavior of animals. Senator Proxmire sarcastically described Hutchinson's research as the "study of jaw-grinding and biting by angry or hard-drinking monkeys. . . . " (*Id.* at p. 116 [61 L.Ed.2d at p. 419].)

The claim Hutchinson was a limited purpose public figure was predicated on two grounds, his receipt of federal funds (which had been reported in the local newspapers) and his utilization of the media (demonstrated by reportage of his response to the Golden Fleece Award). (443 U.S. at p. 134 [61 L.Ed.2d at p. 431].) The evident distinction between *Hutchinson v. Proxmire* and this case is

that there was no pre-existing controversy in *Hutchinson v. Proxmire.*

The petition for rehearing is denied.

BLEASE, Acting P. J.

We concur:

SPARKS, J.

NICHOLSON, J.

APPENDIX D

Third Appellate District No. C018626/C018843
S053175

IN THE SUPREME COURT OF CALIFORNIA

DOUGLAS G. BAUGHER Et Al., Respondents

v.

STATE OF CALIFORNIA Et Al., Appellants

(Filed Jul. 17, 1996)

Appellants' petition for review DENIED.

The requests for an order directing publication of the opinion are denied.

Mosk, J. and Werdegar, J. are of the opinion the petition should be granted.

George
Chief Justice